SANDANATAVAN MARIMUTHU & ANOR v. BADAN PENGURUSAN BERSAMA - PV3; TSS SECURITY SERVICES SDN BHD (THIRD PARTY)

HIGH COURT MALAYA, KUALA LUMPUR
LAU BEE LAN J
[CIVIL SUIT NO: S-22-197-2010]
29 DECEMBER 2014

TORT: *Negligence – Duty of care – Plaintiffs' unit in condominium broken into – Whether defendant as Joint Management Body ('JMB') had duty to manage and maintain individual units – Whether defendant duty bound only to maintain common property – Whether defendant owed any duty to plaintiffs in relation to security of their unit – Whether there was breach of statutory duty – Whether defendant liable for losses sustained in plaintiffs' own unit – Whether JMB a public authority – Whether Building and Common Property (Maintenance and Management) Act 2007 excludes private law remedy – Building and Common Property (Maintenance and Management) Act 2007, ss. 2, 4, 8*

LAND LAW: *Management property – Common property – Joint Management Body ('JMB') – Plaintiffs' unit in condominium broken into – Whether defendant as JMB had duty to manage and maintain individual units – Whether defendant duty bound only to maintain common property – Whether defendant owed any duty to plaintiffs in relation to security of their unit – Whether there was breach of statutory duty – Whether defendant liable for losses sustained in plaintiffs' own unit – Whether JMB a public authority – Whether Building and Common Property (Maintenance and Management) Act 2007 excludes private law remedy – Building and Common Property (Maintenance and Management) Act 2007, ss. 2, 4, 8*

The plaintiffs were the joint owners of a unit ('the unit') at a condominium ('the condominium'). The defendant was a Joint Management Body ('JMB') duly constituted under the Building and Common Property (Maintenance and Management) Act 2007 ('Act 663') having the duty of managing and maintaining the common property of the condominium. The third party was appointed by the defendant to provide security services to the condominium. On 15 April 2009, the plaintiffs' unit at the condominium was broken into. The plaintiffs claimed against the defendant based on the tort of negligence arising from a breach of statutory duty and sought, *inter alia*, special damages which included alleged losses due to the incident of theft. The defendant denied liability essentially on the grounds, *inter alia*, that as a JMB, they were responsible for the maintenance and management of the common property and this did not include individual units. The issues that arose were (i) whether the defendant had acted negligently or breached the contract towards the plaintiff when the plaintiffs' unit was broken into; (ii) whether the defendant was fully responsible for losses and/or damages suffered by the plaintiffs; (iii) whether the defendant was capable of setting aside liability

against the plaintiffs based on the ground that the third party was an independent contractor; and (iv) whether the duty of the defendant was only to ensure proper maintenance and management of the common property.

Held (dismissing plaintiffs' claim with costs):

(1) In order for the plaintiffs to succeed in their claim for omissions on the part of the defendant, the wording of the statutory provision relied on must impose an unqualified obligation on specified persons to perform or refrain from doing a particular act. To determine whether a statutory duty was imposed on the defendant, it was incumbent for the court to examine ss. 2 and 8 of the Act 663. The legislature had intended that the defendant is dutybound only to maintain and manage those areas defined as 'common property' in s. 2 and to exclude any obligation on the part of the defendant with regard to the security of an individual parcel. Hence, the defendant did not owe any duty to the plaintiffs in relation to the security of their unit and the defendant could not be liable for any losses sustained in the plaintiffs' own unit. (paras 15, 19 & 22)

(2) Since the plaintiffs have failed to establish a statutory duty on the defendant's part to ensure the security of the plaintiffs, it followed that when there is no public duty of care there is equally no duty of care to be established at common law. Hence, since the relevant legislation applicable, namely, Act 663, imposed no statutory duty; the plaintiffs' claim in common law negligence must inevitably fail. (paras 27 & 29)

(3) By virtue of s. 4 of Act 663, it was clear that JMB was a creature of statute namely, Act 663, a piece of Federal legislation "for the purposes" as per the long title "only of ensuring uniformity of law and policy with respect to local government to make laws relating to the maintenance and management of buildings and common property within Peninsular Malaysia and the Federal Territory of Labuan." Thus, the JMB was for all intents and purposes a 'public authority'. The plaintiffs' manner of distinguishing the cases of *Stovin v. Wise* and *Gorringe v. Calderdale Metropolitan Borough Council* on the basis of drawing a distinction between a 'public authority statutory' and 'private statutory body' did not hold water. (para 31)

(4) In considering whether Act 663 excludes a private law remedy, the answer was in the affirmative. Hence, the plaintiffs' submission was not relevant as "Parliament could not have intended to confer on the occupiers of a condominium a private right of action against its own joint management body regarding losses in their individual units when the joint management body does not even owe a duty pertaining to the protection of the plaintiffs' individual unit in the first place". (paras 33)

Case(s) referred to:

Chor Phaik Har v. Farlim Properties Sdn Bhd [1994] 4 CLJ 285 FC ***(refd)***
E (a minor) v. Dorset County Council and other appeals [1995] 3 All ER 353 ***(refd)***
Gorringe v. Calderdale Metropolitan Borough Council [2004] 1 WLR 1057; [2004] 2 All ER 326 ***(foll)***
Groves v. Lord Wimborne [1898] 2 QB 402 ***(refd)***
Hague v. Deputy Governor of Parkhurst Prison and others [1991] 3 All ER 733 (HL) ***(refd)***
Kerajaan Malaysia & Ors v. Lay Kee Tee & Ors [2009] 1 CLJ 663 FC ***(foll)***
M (a minor) and another v. Newham London Borough Council and others [1994] 4 All ER 602 ***(refd)***
Master Brisbane Itang v. Robinson Lee & Ors [2014] 1 CLJ 726 CA ***(foll)***
Selvaraju Velasamy & Anor v. Abdullah Ali Kutty & Ors [2009] 2 CLJ 753 HC ***(foll)***
Stovin v. Wise [1996] 1 AC 923 ***(foll)***
X and others (minors) v. Bedfordshire County Council [1995] 3 All ER 353 ***(refd)***

Legislation referred to:

Building and Common Property (Maintenance and Management) Act 2007, ss. 2, 4(3), 8(1)(a), (i), (2)(e), 22(3)(b)
Federal Constitution, art. 160(2)

Factory and Workshop Act 1878 [UK], s. 5
Highways Act 1980 [UK], s. 41(1)
Road Traffic Act 1988 [UK], ss. 39(2), (3)

For the plaintiffs - Nicholas Netto; M/s Netto & Yohendra
For the defendant - Baljit Singh Sidhu (Nor Shahadah Saari, Abd Shukor Ahmad & Nur Adila Jalaludin with him); M/s Shukor Baljit & Partners
For the 3rd Party - Kartar Singh (CM Maran with him); M/s Bachan & Kartar

Reported by Suhainah Wahiduddin

JUDGMENT

Lau Bee Lan J:

Brief Background

[1] The undisputed facts are these. The plaintiffs are the joint owners of Unit B-5-2 ('the unit') at the Platinum Victory 3 Condominium located in Taman Melati, Setapak, Kuala Lumpur ('the condominium').

[2] The defendant is a joint management body ('JMB') duly constituted under the Building and Common Property (Maintenance and Management) Act 2007 ('Act 663') having the duty of managing and maintaining the common property of the condominium.

[3] The third party is a company established under the Companies Act 1965 and was appointed by the defendant to provide security services to the condominium *via* security services agreement dated 22 August 2008 (exh. D33).

[4] In a nutshell, the plaintiffs' claim against the defendant is for the break-in of the plaintiffs' unit at the condominium on 15 April 2009. As to the nature of the claim I shall refer to it later.

[5] The plaintiffs are claiming for, *inter alia*, special damages in the amount of RM328,162 which includes alleged losses of RM320,860 worth of jewelry and RM6,000 cash.

[6] The defendant (JMB) denied liability essentially on the grounds (i) as a joint management body they are responsible for the maintenance and management of the common property and this does not include individual units; (ii) further/in the alternative the JMB has appointed a third party to manage the security of the condominium; (iii) further/in the alternative the third party is an independent contractor; and (iv) further and in the alternative in the event the defendant is found liable to the plaintiffs, the defendant seeks to be indemnified by the third party against the plaintiffs' claim on a 100% basis.

Issues

[7] The agreed issues to be tried are:

(i) Sama ada Defendan sebagai Badan Pengurusan Bersama kondominium tersebut telah cuai dan/atau melanggar kontrak terhadap Plaintif-Plaintif akibat kejadian kecurian di unit milik Plaintif-Plaintif pada 15/4/2009;

(ii) Sama ada Defendan sebagai Badan Pengurusan Bersama kondominium tersebut adalah bertanggungjawab sepenuhnya terhadap Plaintif-Plaintif bagi segala kehilangan dan/atau kerosakan yang ditanggung oleh Plaintif-Plaintif akibat kejadian kecurian di unit milik Plaintif-Plaintif pada 15/4/2009;

(iii) Sama ada Defendan dapat menolak liabiliti terhadap Plaintif-Plaintif bagi segala kehilangan dan/atau kerosakan yang ditanggung oleh Plaintif-Plaintif akibat kejadian kecurian di unit milik Plaintif-Plaintif pada 15/4/2009 atas alasan oleh Defendan kononnya bahawa Pihak Ketiga merupakan seorang kontraktor bebas (independent contractor);

(iv) Sama ada Defendan dapat menolak liabiliti terhadap Plaintif-Plaintif bagi segala kehilangan dan/atau kerosakan yang ditanggung oleh Plaintif-Plaintif akibat kejadian kecurian di unit milik Plaintif-Plaintif pada 15/4/2009 atas alasan oleh Defendan kononnya bahawa Defendan hanya bertanggungan untuk menjaga harta bersama (common property) sahaja.

[8] The English version of the agreed issues are as follows:

(i) Whether the Defendant who is the Joint Management Body of the said condominium has acted negligently and/or breached the contract towards Plaintiffs when the incident of theft occurred on 15/4/2009 in a unit of the parcel owned by Plaintiffs;

(ii) Whether the Defendant who is the Joint Management Body of the said condominium is fully responsible for losses and/or damages suffered by the Plaintiffs due to the theft incident occurred on 15/4/2009;

(iii) Whether the Defendant is capable to set aside liability against Plaintiffs for losses and/or damages suffered by the Plaintiffs due to the theft incident based on the ground that the Third Party is an independent contractor; and

(iv) Whether the Defendant is capable to set aside liability against Plaintiffs for losses and/or damages suffered by the Plaintiffs due to the theft incident based on the ground that duty of Defendant is only to ensure proper maintenance and management of the common property.

Witnesses

[9] The plaintiffs called six witnesses, the defendant had one witness whilst the third party called two witnesses. The witnesses are as follows:

(a) PW1 - Sandanatavan a/l Marimuthu, the plaintiff;

(b) PW2 - Krishnaveni a/p Puspanathen;

(c) PW3 - Thevendran a/l D Puspanathan;

(d) PW4 - Mohamad Ibrahim bin Moosagani (Varusai Jewellers);

(e) PW5 - Tan Geok Hua (Sentul Goldsmith);

(f) PW6 - Insp. Mohd Shafizan bin Sazali (Investigations Officer);

(g) DW1 - Tan Kon Chai;

(h) SPK1 (saksi pihak ketiga 1) - Sarjan Mohamad Kamal bin Hj Abbas (PDRM); and

(i) SPK2 - Lim Kwee Yam (TSS Security Services Sdn Bhd).

[10] After the completion of the full trial, on 11 September 2013, the court directed the plaintiffs and the defendant to prepare submissions first and to extend a copy of the said submissions to the third party. It was further ordered that directions as to third party submissions would be dependent on whether the court finds in favour of the plaintiffs.

[11] After considering the submissions of the plaintiffs and the defendant, including the pleadings and relevant authorities, the court dismissed the plaintiffs' claim and the plaintiffs were ordered to pay costs of RM10,000 to the defendant and RM5,000 to the third party.

Findings

[12] The plaintiffs' claim against the defendant is based on the tort of negligence as particularised in para. 13(a) to (f) of the amended statement of claim in the amended pleadings (11)(Bundle A). The plaintiffs concede there is no contractual relationship between the parties, hence no cause in action for breach of contract arises.

Whether There Is A Statutory Duty On Part Of Defendant To The Plaintiffs

[13] Section 4(3) of Act 663 pleaded in para. 3 of the amended statement of claim merely connotes that the defendant being a body corporate has the capacity to sue and be sued. Therefore a perusal of the amended statement of claim shows that the defendant has not pleaded any statutory provision which the plaintiffs seek to rely on as having established a statutory duty on the part of the defendant.

[14] In order to pin the defendant with liability for negligence arising from a breach of statutory duty, the plaintiff in submission stated:

(i) If the court makes a finding that the third party was only appointed solely for the security of the common property, the defendant still had the statutory duty to:

(a) appoint a suitable and competent security company to manage the common property of the Condominium; and

(b) ensure that the security company performed its duty properly at all times and in accordance with the Security Services Agreement.

(ii) The defendant's duty is to appoint the third party would have been made pursuant to ss. 8(1)(a), 8(1)(i) and 8(2)(e) of Act 663.

(iii) Whilst s. 8(2) of Act 663 does not specifically empower the defendant to appoint the third party for the duty mentioned in s. 8(1)(a) and s. 8(1)(i) of Act 663, the appointment of the third party is covered by s. 22(3)(b) of Act 663, which allows the defendant to make payment out of the building maintenance fund as payment to a security company for its services.

(iv) 'Common property' defined in s. 2 of Act 663, include entrances and exits, stairs, stairways, corridors and lobbies. The defendant failed and/or omitted in its statutory duty:

(a) To monitor and/or ensure that the entrances/exit points were properly guarded or to ensure that their agent, the third party monitored and/or ensure that the entrances/exit points were properly guarded. The defendant alleged this failure and/or omission allowed the culprit responsible for the theft to enter the condominium, break into the plaintiffs' unit and escape with the stolen items from the exit point of the condominium; and

(b) To ensure that the third party was competent enough to monitor the CCTV system at the guard house, thus allowing the culprit responsible to break into the plaintiffs' unit from the corridor, drag the iron safe out with a blanket through the corridor to the stairway, remove the jewellery inside the safe at the stairs, take the stolen items downstairs to the main lobby, and thereafter escape from the condominium through the entrances/exit points, undetected at all times.

[15] With respect I am of the view that the aforesaid submission of the plaintiff is misplaced. In order for the plaintiffs to succeed in their claim for omissions on the part of the defendant, the wording of the statutory provision relied on must impose an unqualified obligation on specified persons to perform or refrain from doing a particular act. I draw support from the case of *Groves v. Lord Wimborne* [1898] 2 QB 402 (cited by the defendant), involving an action to recover damages for an alleged breach of the statutory duty imposed upon the defendant, the proprietor of the factory (where the plaintiff worked) by s. 5 of the Factory and Workshop Act 1878, in allowing certain dangerous machinery to remain unfenced, whereby personal injury had been occasioned to the plaintiff. At pp. 413-414, Rigby LJ stated:

> There has been a failure in the performance of an absolute statutory duty, and there is no need for the plaintiff to allege or prove negligence on the part of any one in order to make out his cause of action …
>
> The only question that really arises is upon the construction of the Act itself. Looking at the whole purview of the Act, is it one of those Acts by which the Legislature renders a particular course of conduct imperative, and a deviation from it punishable by penalty, in the general interests of the public at large, but does not intend that an individual shall have a private right of action for injury occasioned to him by breach of its provisions; or is it one of those Acts in which the Legislature, having created a new duty in the interests of a certain class of persons, and having provided a statutory remedy for breach of that duty, intends that that remedy shall be the only one available? It is in my opinion neither one nor the other. The provisions of s. 5 are intended for the protection from injury of a particular class of persons, who come within the mischief of the Act. The plaintiff is one of those persons, the possibility of injury to whom through neglect to fence machinery the section contemplates. That being so, the only question seems to be whether the provisions of the Act with regard to the imposition of fines for neglect of the duty created by the section reasonably lead to the conclusion that the Legislature intended that such fines should be the only remedy for breach of that duty.

His Lordship at p. 415 then held:

> Looking at the purview of the whole Act, I cannot think it reasonable to suppose that the Legislature intended the penalty imposed by s. 82 to be the only remedy for injury occasioned by breach of the absolute statutory duty created by the Act. For these reasons I think judgment should be entered for the plaintiff for the damages assessed by the jury.

[16] Further support is found in the case of *Chor Phaik Har v. Farlim Properties Sdn Bhd* [1994] 4 CLJ 285; [1994] 3 MLJ 345 [352C], wherein the Federal Court opined that "[I]n interpreting a statute, what the court is endeavouring to do is to give effect to the object and intent of Parliament in enacting that statute".

[17] In *Stovin v. Wise* [1996] AC 923 (cited by the defendant) (putting aside the argument of the plaintiffs that *Stovin*'s case ought to be distinguished which I shall address later), at p. 935B-C, Lord Nicholls of Birkenhead stated:

> Public authorities discharging statutory functions operate within a statutory framework. Since the will of the legislature is paramount in this field, the common law should not impose a concurrent duty inconsistent with this framework. A common law duty must not be inconsistent with the performance by the authority of its statutory duties and powers in the manner intended by Parliament, or contrary in any other way to the presumed legislative intention.

[18] Further, the principle of strict adherence to the statutory provision and that no statutory duty can be imposed beyond that provided under the statute rings true in the following two cases (the views therein which I agree, also referred to by the plaintiffs but for the proposition that the principle in *Stovin*'s case and *Gorringe v. Calderdale Metropolitan Borough Council* [2004] 1 WLR 1057; [2004] 2 All ER 326 were considered in relation to the statutory duty of a government/public authority which I shall revert to later):

(a) *Selvaraju Velasamy & Anor v. Abdullah Ali Kutty & Ors* [2009] 2 CLJ 753; [2009] 8 MLJ 267. This is an appeal by the plaintiffs against the decision of the Sessions Court against the dismissal of the plaintiffs' claim against the third and fourth defendants (JPJ and Government of Malaysia respectively). In dismissing the appeal Vernon JC (now JCA) at p. 285 para. 33 stated:

> [33] In this context s. 16(2)(a) of the RTA and r. 15 of the MVR clearly prescribes the conditions and the procedure to be complied with by an applicant when applying for a motor vehicle licence. In construing the meaning of the said provisions it cannot be said that the said provisions impose a statutory duty on the third defendant in the granting of motor vehicle licences to ascertain the authenticity of the certificate of insurance lodged with an application. To adopt such an interpretation would be tantamount to importing contrary meaning to the plain words of the said provisions. Accordingly, there is no statutory duty on the part of the third defendant when granting a motor vehicle licence to ensure that the certificate of insurance lodged by an applicant is valid and not a forgery.

(b) *Master Brisbane Itang v. Robinson Lee & Ors* [2014] 1 CLJ 726; [2014] 2 MLJ 565. In this case the plaintiff, who was a minor sued the school teacher, Ministry of Education and the Government of Malaysia through his guardian, claiming for damages as the defendants had failed to prevent him being bitten by a mosquito while in the boarding school and contracting the JE virus. As a result of the infection, the plaintiff suffered brain damage, became wheelchair bound and was unable to take care of himself. The plaintiff became permanently disabled both physically and mentally and required lifetime care.

The plaintiff contended that a pig farm should never be located within a 2km radius of a school as pigs were the natural hosts of the JE virus which was transmitted to human beings *via* the culex mosquitoes from infected pigs. Therefore, it was contended that the relevant authorities knew of the high risks involved, should have put in place appropriate public health policies and ensure their effective implementation to protect members of the public including giving vaccination against the JE virus to the plaintiff and other children in the school. The plaintiff submitted that the defendants had common law and/or statutory duties towards the plaintiff who was placed at the boarding school. Stephen Chung J in dismissing the plaintiff's claim at p. 617 para. 26, amongst others, stated:

> [26] There is no provision in this Act [the Prevention and Control of Infectious Diseases Act 1988 ('PCIDA')] to provide for any mandatory or compulsory or forced immunisation of any person or class of persons against an infectious disease or to relocate or close any premises as a preventive measure, in particular if there is no declaration of an infected local area.

[19] Applying the legal principles to the instant case, to determine whether a statutory duty is imposed on the defendant, it is incumbent for the court to examine the relevant provisions of Act 663. Section 8 of Act 663 provides:

> Duties and powers of Joint Management Body
>
> 8. (1) The duties of the Body include the following:
>
> (a) to properly maintain the common property and keep it in a state of good and serviceable repair;
>
> (b) to determine and impose charges that are necessary for the repair and proper maintenance of the common property;
>
> …
>
> (2) The powers of the Body shall include the following:
>
> (a) to collect from purchasers maintenance and management charges in proportion to the allocated share units of their respective parcels;
>
> (b) to authorize expenditure for the carrying out of the maintenance and management of the common property;
>
> …

[20] Section 2 of Act 663 defines 'common property' and 'parcel':

> "common property", in relation to a development area, means so much of the development area as is **not comprised in any parcel**, such as the structural elements of the building, stairs, stairways, fire escapes, entrances and exits, corridors, lobbies, fixtures and fittings, lifts, refuse chutes, refuse bins, compounds, drains, water tanks, sewers, pipes, wires, cables and ducts that serve more than one parcel, the exterior of all common

A parts of the building, playing fields and recreational areas, driveways, car parks and parking areas, open spaces, landscape areas, walls and fences, and all other facilities and installations and any part of **the land used or capable of being used or enjoyed in common by all the occupiers of the building;**

B "parcel", in relation to -

(a) a building intended for subdivision, means one of the individual units comprised in the building which (except in the case of an accessory parcel) is held or to be held under a separate strata title;

…

C (Emphasis added)

[21] The preamble to Act 663 that "the proper maintenance and management of buildings and common property" further augments the defendant's argument.

[22] Thus from a reading of the relevant provisions of Act 663, I am of the opinion the Legislature has intended that (i) the JMB is duty bound only to D maintain and manage those areas defined as 'common property' in s. 2 and (ii) to exclude any obligation on the part of the defendant with regard to the security of an individual parcel. Hence the defendant does not owe any duty to the plaintiffs in relation to the security of their Unit on 15 April 2009 and the defendant could not be liable for any losses sustained in the plaintiffs' own unit.

E **Whether Act 663 Excludes A Private Law Remedy**

[23] In *Gorringe*'s case (*supra*), for context, the claimant suffered severe injury driving a motor car on a country road when, just short of a crest in the road, she braked sharply and skidded into the path of a bus coming from F the opposite direction. The claimant brought proceedings against the defendant local authority. She argued that the authority's failure to place on or near the road sufficient signs giving warning to motorists that they were approaching a dangerous part of the road constituted a breach of its duty as highway authority under s. 41(1) of the Highways Act 1980 'to maintain the highway'. Alternatively she contended that ss. 39(2), (3) of the Road Traffic Act 1988 G which imposed a duty on every local authority to prepare and carry out a programme of measures designed to promote and improve road safety, created a common law duty to users of the highway, in parallel with the statutory duty, to take reasonable steps to promote and improve road safety. The deputy judge found in her favour, holding that in the absence of a 'slow' H warning, the claimant could not have been at fault. The majority of the Court of Appeal disagreed, holding that the authority was not in breach of any duty to the claimant. She appealed to the House of Lords. In a unanimous decision the House of Lords dismissed the appeal of the claimant.

I **[24]** At p. 330 para. 3, Lord Steyn's observation on the complexity and evolving area of law on negligence and statutory duties and powers is instructive:

[3] In recent years four House of Lords decisions have been milestones in the evolution of this branch of the law … There are two comments on these decisions which I would make. First, except on a very careful study

> of these decisions, there is a principled distinction which is not always in the forefront of discussions. It is this: in a case founded on breach of statutory duty the central question is whether from the provisions and structure of the statute an intention can be gathered to create a private law remedy? In contradistinction in a case framed in negligence, against the background of a statutory duty or power, a basic question is whether the statute excludes a private law remedy? An assimilation of the two inquiries will sometimes produce wrong results.

[25] With reference to Lord Steyn's *dictum*, since this instant case falls in the second category, the basic question to be asked is whether the statute (Act 663) excludes a private law remedy. In this regard, in *Hague v. Deputy Governor of Parkhurst Prison and others* [1991] 3 All ER 733 (HL); *Weldon v. Home Office* to determine whether a private law remedy is excluded, Lord Jauncey of Tullichettle (p. 750h) stated:

> … [I] take from *these authorities that it must always be a matter for consideration whether the legislature intended that private law rights of action should be conferred upon individuals in respect of breaches of the relevant statutory provision.* The fact that a particular provision was intended to protect certain individuals is not of itself sufficient to confer private law rights of action upon them, something more is required to show that the legislature intended such conferment. (Emphasis added)

[26] After having regard to the approach advocated by Lord Jauncey in *Hague* (*supra*) and having considered the relevant provisions which I have alluded to, I am inclined to agree with the defendant's submission that:

(a) the policy of Act 663, *inter alia*, is to establish an administrative system to regulate the maintenance and management of buildings. Nothing in s. 8 of Act 663, or the whole statute itself, could show that the legislature had intended to confer on an owner/occupier of an individual parcel in the Condominium private law rights for breach of the provisions to Act 663 including the right to compensation for break-ins of their individual units in the building.

(b) the duty in s. 8 of Act 663 to 'maintain and manage the common property' had been worded in such broad terms that direct enforcement by individuals such as the Plaintiffs in the present case cannot be maintained.

(See *M (a minor) and another v. Newham London Borough Council and others; X and others (minors) v. Bedfordshire County Council* [1994] 4 All ER 602 at p. 615)

(c) that a private law cause of action is excluded as the observance of such a common law duty would have a tendency to discourage the due performance of a Joint Management Body of its functions under Act 663.

Support for this proposition is found in the case of *X and others (minors) v. Bedfordshire County Council* [1995] 3 All ER 353; *M (a minor) and another v. Newham London Borough Council and others* [1994] 4 All ER 602; *E (a minor)*

v. Dorset County Council and other appeals [1995] 3 All ER 353 [pp. 368-370] where the House of Lords stated:

> Most statutes which impose a statutory duty on local authorities confer on the authority a discretion as to the extent to which, and the methods by which, such statutory duty is to be performed. It is clear both in principle and from the decided cases that the local authority cannot be liable in damages for doing that which Parliament has authorised. Therefore if the decisions complained of fall within the ambit of such statutory discretion they cannot be actionable in common law. However, if the decision complained of is so unreasonable that it falls outside the ambit of the discretion conferred upon the local authority, there is no *a priori* reason for excluding all common law liability.
>
> …
>
> It follows that in seeking to establish that a local authority is liable at common law for negligence in the exercise of a discretion conferred by statute, the first requirement is to show that the decision was outside the ambit of the discretion altogether: if it was not, a local authority cannot itself be in breach of any duty of care owed to the plaintiff.

[27] Reverting to the court's finding that the plaintiffs have failed to establish a statutory duty on the defendant's part to ensure the security of the plaintiffs, on 15 April 2009, learned counsel for the defendant submitted based on the case of *Stovin v. Wise* [HL] (*supra*), it follows that when there is no public duty of care there is equally no duty of care to be established at common law. The relevant passage is at p. 952H to p. 953A (per Lord Hoffmann):

> The same is true of omission to perform a statutory duty. If such a duty does not give rise to a private right to sue for breach, it would be unusual if it nevertheless gave rise to a duty of care at common law which made the public authority liable to pay compensation for foreseeable loss caused by the duty not being performed. It will often be foreseeable that loss will result if, for example, a benefit or service is not provided. If the policy of the Act is not to create a statutory liability to pay compensation, the same policy should ordinarily exclude the existence of a common law duty of care.

[28] I agreed with the defendant's submission as the House of Lords in the case of *Gorringe*, at p. 348, Lord Scott stated:

> The same is true of omission to perform a statutory duty. If such a duty does not give rise to a private right to sue for breach, it would be unusual if it nevertheless gave rise to a duty of care at common law which made the public authority liable to pay compensation for foreseeable loss caused by the duty not being performed. It will often be foreseeable that loss will result if, for example, a benefit or service is not provided. If the policy of the Act is not to create a statutory liability to pay compensation, the same policy should ordinarily exclude the existence of a common law duty of care.

[29] Hence I agreed with the argument canvassed by the defendant that the relevant legislation applicable, namely, Act 663 imposed no statutory duty; the plaintiffs' claim in common law negligence must inevitably fail. I draw support from the case of *Kerajaan Malaysia & Ors v. Lay Kee Tee & Ors* [2009] 1 CLJ 663; [2009] 1 AMR 509 as highlighted to the court by the learned counsel for the defendant in this manner:

> [A]n attempt was made by the Plaintiff (the Respondent in the Federal Court) to bring an action in the general law of tort against the Defendant. In striking out the claim the Federal Court, speaking through Nik Hashim FCJ, after having referred to the decision of the High Court of Australia in the case of *The Administration of the Territory of Papua and New Guinea v. Leahy* (1961) 105 CLR 6 had said the following at page 526:
>
> > Not too long ago, attempts to impose a common law duty even in cases where there is a statutory duty has consistently not found favour with the courts. In *Stovin v. Wise* [1996] AC 923 at 953 the House of Lords said:
> >
> > > … If the policy of the Act is not to create a statutory liability to pay compensation, the same policy should ordinarily exclude the existence of a common law duty of care.
> >
> > This principle was applied in *Gorringe v. Calderdale Metropolitan Borough Council* [2004] 2 All ER 326 where the House of Lords opined at p 336:
> >
> > > In the absence of a right to sue for breach of the statutory duty itself, *it would in my opinion have been absurd to hold that the council was nevertheless under a common law duty to take reasonable care* to provide accommodation for homeless persons whom it could reasonably foresee would otherwise be reduced to sleeping rough. And the argument would in my opinion have been even weaker if the council, instead of being under a duty to provide accommodation, merely had power to do so.
> > > (Emphasis added)
> >
> > In *Capital and Counties plc v. Hampshire County Council & Ors* [1997] 2 All ER 865 the English Court of Appeal reiterated the principle in *Gorringe* (*supra*) when it heard jointly three appeals concerning delay in action on the part of the fire fighting authorities. The claims were struck out on the ground of no cause of action. On appeal, the Court of Appeal affirmed the decision and applied *East Suffolk Rivers* (*supra*) and ruled at p 878:
> >
> > > In our judgment the fire brigade are not under a common law duty to answer the call for help and are not under a duty to take care to do so. If therefore they fail to turn up or fail to turn up in time because they have carelessly misunderstood the message, got lost on the way or run into a tree, they are not liable.

A

Other Matters

[30] I now return to the plaintiff's contention that the principle in the cases of *Stovin* and *Gorringe* is only applicable to a public statutory body but does not involve a private statutory body. According to the plaintiffs the defendant in this present case is a 'private statutory body' in the likes of Petronas as opposed to a 'public statutory body' (see para. [22] above).

B

[31] With regret I could not agree with the plaintiffs' contention for these reasons. The term 'public authority' is interpreted under art. 160(2) Federal Constitution to mean:

C

> "Public authority" means the Yang di-Pertuan Agong, the Ruler or Yang di-Pertua Negeri of a State, the Federal Government, the Government of a State, a local authority, a statutory authority exercising powers vested in it by federal or State law, any court or tribunal other than the Federal Court, the Court of Appeal and High Courts, or any officer or authority appointed by or acting on behalf of any of those persons, courts, tribunals or authorities.

D

By virtue of s. 4 of the Act 663, it is clear that the JMB is a creature of statute namely, Act 663, a piece of Federal legislation "for the purposes" as per the long title "*only of ensuring uniformity of law and policy with respect to local government to make laws relating to the maintenance and management of buildings and common property within Peninsular Malaysia and the Federal Territory of Labuan*". Thus the JMB is for all intents and purposes a 'public authority' and in my view the plaintiff's manner of distinguishing the cases of *Stovin* and *Gorringe* on the basis of drawing a distinction between a 'public statutory authority' and 'private statutory body' with respect does not hold water.

E

F

[32] The plaintiffs quoted a *dictum* of the learned judge in *Master Brisbane*'s case (*supra*) and took the position that "*the statutory duty of the defendant is for the protection of a limited class of the public, ie, owners and occupants of the Condominium. (Act 663) confers the members of that class a private right of action for breach of the duty*". The passage at p. 616 para. 22C reads:

G

> A private law cause of action only arises if it can be shown as a matter of construction of the statute that the statutory duty is imposed for the protection of a limited class of the public and that Parliament intends to confer on members of that class a private right of action for breach of the duty. The mere assertion of the careless exercise of a statutory duty is not sufficient in itself to give rise to a private law cause of action.

H

[33] Based on the principles I have alluded to in considering whether Act 663 excludes a private law remedy (see paras. 27 to 30 above), I find the answer to be in the affirmative. Hence I am in agreement with the defendant that the plaintiffs' submission is not relevant as "*Parliament could not have intended to confer on the occupiers of a condominium a private right of action against its own joint management body regarding losses in their individual units when the joint management body does not even owe a duty pertaining to the protection of the plaintiffs' individual Unit in the first place*".

I

Conclusion

[34] For the aforesaid reasons the plaintiffs' claim is dismissed with costs of RM10,000 to be paid to the defendant and RM5,000 to be paid to the third party.